

86-746<sup>①</sup>

Supreme Court, U.S.  
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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term 1986

No. \_\_\_\_\_

SHARE, et al.,

PETITIONERS,

v.

STACIE BERING, M.D., et al,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF WASHINGTON

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Sept. 15, 1986

1986

## QUESTIONS PRESENTED

1. Is an injunction which prohibits all persons from picketing or engaging in verbal free speech activities on a section of public sidewalk in front of a medical facility, narrowly drawn to serve a compelling state interest (a) in ensuring access to medical facilities; (b) in ensuring women's access to abortions?

2. Is an injunction which prohibits all persons from using specific terms while engaging in free speech activities on public sidewalks near a medical facility where children are present, narrowly drawn to serve a compelling state interest in protecting children's health and relationship to medical personnel?

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No. \_\_\_\_\_  
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SHARE; MICHAEL WALTERS, individually and in his representative capacity as co-director of SHARE; GRACE A. GERL, individually and in her representative capacity as co-director of SHARE; TERESA R. LINDLEY, individually and as a member of SHARE; "JOHN" and "JANE DOE" and all other persons acting in concert with any and all of the above named defendants,

PETITIONERS,

vs.

STACIE C. BERING, M.D., individually and as a Washington professional corporation; PAMELA G. SILVERSTEIN, M.D., individually and as a Washington professional corporation; HOWARD JOHNSON, individually and as a general partner of Stevens Medical-Dental Limited Partnership; MICHAEL MCCARTHY, M.D., individually,

RESPONDENTS.

-----  
PETITION FOR A WRIT OF CERTIORARI TO THE  
SUPREME COURT OF THE STATE OF WASHINGTON  
-----

The Petitioners SHARE, MICHAEL WALTERS, GRACE A. GERL and TERESA LINDLEY, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Washington entered in this proceeding on June 19, 1986.

#### **OPINION BELOW**

The decision of the Supreme Court of the State of Washington, reported at 106 Wn.2d 212, 721 P.2d 918 (1986), appears in the appendix hereto.

#### **JURISDICTION**

The Supreme Court of the State of Washington issued its opinion herein on 19 June 1986; said opinion became the final decision terminating review upon issuance of a mandate on 9 July 1986. No rehearing was sought. The jurisdiction of this Court arises under 28 U.S.C. §1257 (3) respecting a right, privilege or immunity claimed under the Constitution of

the United States, Amendment One. See, e.g.,  
Fox v. Washington, 236 U.S. 273 (1915).

Review is further sought pursuant to  
Supreme Court Rule 19 section 1(a):

"Where a state court has decided  
a federal question of substance not  
theretofore determined by this court,  
or has decided it in a way probably  
not in accord with applicable  
decisions of this court."

#### **QUESTIONS PRESENTED**

1. Is an injunction which prohibits all  
persons from picketing or engaging in verbal  
free speech activities on a section of public  
sidewalk in front of a medical facility, nar-  
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2. Is an injunction which prohibits all  
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sidewalks near a medical facility where  
children are present, narrowly drawn to serve

a compelling state interest in protecting children's health and relationship to medical personnel?

### **STATUTORY PROVISIONS**

No specific statutory provisions are involved; see Wash. Rev. Code sec. 7.40 (app 51)

### **STATEMENT OF THE CASE**

The facts of the case are set out in greater detail in the lower court opinion, reproduced at App. 1.

Respondents **BERING**, **SILVERSTEIN** and **MCCARTHY** are doctors; they practice in a facility operated by respondent **JOHNSON** and others called the Sixth Avenue Medical Building, located near downtown Spokane, Washington.

**SHARE** is an informal organization opposed to abortion. Members of **SHARE**, including the named petitioners, began picketing in front of the Sixth Avenue Medical Building. Picketers

were also present who were not members of SHARE.

Respondents sought and obtained a temporary restraining order and, after a hearing, a permanent injunction (App 3). The court found that picketers had positioned themselves on the public sidewalks in front of the building and at the only walkway to the main entrance; that picketers had obstructed the passage of visitors and staff at the Medical Building; that picketing had caused patients and doctors emotional stress; and that picketing had been carried on in an aggressive, disorderly and coercive manner, including referring to doctors in the building as killers or murderers.

The Washington Supreme Court found substantial evidence, although challenged, supported these conclusions.

The injunction prohibited picketers from (1) picketing, demonstrating, or "counseling" at the Medical Building, except along the public sidewalk around the corner from the

front of the building; (2) threatening, assaulting, intimidating or coercing anyone entering or leaving the Medical Building; (3) interfering with ingress or egress to the building; (4) trespassing on the premises; (5) engaging in any unlawful activity directed at respondent physicians or their patients; (6) referring, in oral statements while at the picket site, to physicians or patients, staff, or clients as "murdering" or "murderers", "killing" or "killers"; or to children or babies as being "killed" or "murdered" by anyone in the Medical Building. This injunction was upheld on appeal.

#### REASONS FOR GRANTING PETITION

**I. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS REGARDING PLACE RESTRICTIONS ON FREE SPEECH ACTIVITIES WHICH ARE INAPPROPRIATE UNDER THE FIRST AMENDMENT.**

Free speech activities are subject to reasonable limitations as long as the limitations "are content neutral, are narrowly tailored to serve a significant government

interest and leave open ample alternative channels of communication." United States v. Grace, 461 U.S. 171 (1983).

**A. The injunction uses a place restriction to restrain conduct and content**

The court below justified the injunction because protestors were "aggressive, disorderly and coercive"; but instead of enjoining them from this kind of conduct, the court enjoined all persons associated with SHARE from any free speech activity whatsoever except on a sidewalk around the corner from the front of the building.

The general overbreadth of this injunction is obvious: the court could have (and in fact did) restrain the specific conduct that justified the injunction, without enjoining non-aggressive, coercive, or disorderly conduct.

As to content: the injunction applied only to abortion protesters. (App. 11)

Pickers from a union, say, or opposed to some other political issue, could presumably locate on the front sidewalk and act in an aggressive, coercive and disorderly fashion without violating the order.

The court said this was obviously content-neutral, which begs the question. True, the picketers' conduct is the reason for the injunction; but why is a place restriction necessary to prevent disruptive conduct, if the place restriction only applies to abortion protesters? The injunction in its full breadth is not content-neutral at all; it singles out abortion protesters only, and restricts their use of a place for any conduct, disruptive or not.

Public sidewalks are historically important forums for assembly and communication. Hague v. Committee for Indus. Org., 307 U.S. 496 (1939). The decision below encourages the broad denial of this forum to unpopular causes, far exceeding the reasonable limits

envisioned in Grayned v. Rockford, 408 U.S. 104 (1972).

**B. The injunction is too broad to be justified by a compelling state interest in ensuring access to medical facilities**

The State's interest in ensuring access to medical facilities, if it is sufficiently compelling to justify restriction of First Amendment rights (a point not conceded) would justify at most individualized restraints on conduct which threatens access, not a broad ban. See, Police Dep't v. Mosely, 408 U.S. 42, 98 (1972); Parkwood Co. v. Pro-Life Counseling, Inc., 91 A.D. 2d 551, 552, 457 N.Y.S. 2d 27, 29 (1982). This was acknowledged below (App.13).

**C. The injunction is not justified by a compelling state interest in making abortions available**

The Court below justified excessive restrictions on expression on the ground that the harassing effect of anti-abortion picket-

ers invades a woman's right to privacy in effectuating the abortion decision, citing Roe v. Wade, 410 U.S. 113 (1973).

It is inappropriate to balance free speech against privacy rights; such an analysis yields a dangerous precedent.

First, Roe v. Wade speaks to intrusion by government into the private decision; in the words of dissenting Justice Dore, it does not mean a woman is entitled to make the decision in a vacuum, free from public comment; it is not intended to silence others.

Second, privacy is recognized as a "penumbral" right, springing from the fabric of the Constitution, and covers most aspects of our lives, Griswold v. Connecticut, 381 U.S. 479 (1965). The abortion decision is but one such area, Roe v. Wade, supra.

The decision below elevates the state's interest in ensuring privacy to the same level as the First Amendment. If that is true, then the state has an interest in proscribing any

exercise of free speech. There will always be a privacy claim as to belief -- e.g., "My desire to vote for candidate X is private; expression designed to change my mind therefor violates my privacy and may be curtailed."

Furthermore, if ensuring privacy against private expression is a compelling state interest, then obviously the more effectively the expression persuades, the greater the state's interest in limiting it; speech is free in inverse proportion to its persuasiveness.

Free speech, to be meaningful, must be capable of persuading to action, Thomas v. Collins, 323 U.S. 516 (1945), even if that action is to forgo exercise of an otherwise protected right.<sup>1</sup>

The courts below sought to enjoin

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<sup>1</sup>Thus if picketing is logically related to a particular forum, i.e. the entrance to a medical facility which performs abortions, it is protected from regulation precluding the use of that place. Brown v. Louisiana, 383 U.S. 131 (1966)

"coercive" speech but leveled their injunctions at effective speech: by limiting protest to "down the street and around the corner" the court ensured it would have little impact, thereby enjoining not only any "coercive" activities which may have sporadically occurred, but substantial legitimate protest as well.

In short, an excessively broad injunction has been justified by a logic that can be used in every case, and which makes a mockery of free speech, inviting expression to that which is unlikely to be effective. This Court should review and repudiate such reasoning.

## **II. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE USE OF INJUNCTIONS AGAINST THE CONTENT OF FREE SPEECH.**

The Washington State Supreme Court upheld a restriction against verbally using terms like "killer" or "murderer" by picketers at times when children are present, essentially, a prior restraint on expression.

The court first found that this Court has abandoned "prior restraint" as an issue in free speech cases. Even so, the test recognized is that such restraint must be narrowly drawn to serve a compelling state interest. Consolidated Edison Co. v. Public Serv. Comm., 447 U.S. 530 (1980).

The asserted state interest: that of protecting children,<sup>2</sup> and parents' authority over children.

The problem: anti-abortion picketing is not pornography. The "verbal shock treatment" involved is a defensible viewpoint in logical discussion: that abortion literally comprises "killing" and "murder".<sup>3</sup> Free speech should not be emasculated because of the "discomfort and unpleasantness that always accompany an

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<sup>2</sup>E.g., by preventing their access to materials that would not be obscene for adults, Ginsberg v. New York, 390 U.S. 629 (1968).

<sup>3</sup>Prior to Roe v. Wade there were many courts who agreed.

unpopular viewpoint." Tinker v. Des Moines Indep. Comm'ty Sch. Dist., 393 U.S. 503, 508 (1969); and particularly not in the chilling context of a prior restraint broadly enjoining conduct which might, or might not, fall into the legitimate area of state concern.

### **III. THE ISSUES RAISED HEREIN ARE SIGNIFICANT AND LIKELY TO RECUR**

In summary, petitioners urge that the decision below creates precedent for unreasonably broad injunctions against anti-abortion picketing, both as to location and content; so broad as to allow a court to reduce the effectiveness of the communication and leave no practical alternative forum.

The Court may take judicial notice that abortion-related picketing and protest has become a significant national practice.

Legal cases involving the use of injunctions to limit the scope of such picketing are pending, to the petitioners' knowledge, in nine states including State and Federal

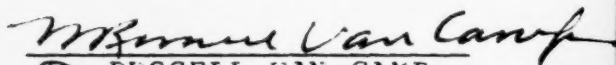
Courts in the states of Ohio, Indiana, Oregon, Pennsylvania, Missouri, Georgia, California and Michigan.

Bering v. SHARE will probably be relied upon as precedent in a number of upcoming decisions. This court should review the decision, to provide guidance for these upcoming, important decisions.

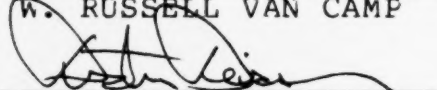
#### CONCLUSION

For these reasons, a writ of certiorari should issue to review the opinion and judgment of the Washington State Supreme Court.

Respectfully Submitted,



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